Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

ANTHONY GUEST,

Petitioner,

v.

TERRY McCANN, Warden,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit erred in failing to determine if the trial judge in Cook County, Illinois was presumed biased (independent of the issue of being actually biased) while he presided over petitioner's capital murder case, in violation of petitioner's due process rights under the Fourteenth Amendment, based on the judge's interest in the outcome of petitioner's trial in June 1983 -- a bench trial — when the judge then knew that he was under investigation for past judicially-corrupt leniency.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Cited Authorities iv

Table of Appendices ix

Opinions Below 1

Jurisdiction 1

Constitutional Provision Involved 2

Statement of the Case 2

I. Summary of Procedural History 2

II. Factual Background 5

A. Nature and Scope of the Evidence Against Judge Pompey 5

B. Judge Pompey's Historical Corruption 7

C. Pompey's Judicial Corruption Leading Up to and Around Guest's Trial 8

D. Judge Pompey's Knowledge That He Was Under Investigation 10

E. Guest's Trial, Verdict and Sentencing ... 11

Contents

	Page
Reasons for Granting the Petition	13
Argument	14
I. The Panel's Erroneous Decision in *Guest* Reflects a Misapprehension of the *Bracy* "Actual Judicial Bias" Cases of the Seventh Circuit and the United States Supreme Court	14
II. Judge Pompey's Disqualifying Interest in the Outcome of Guest's Death Penalty Case Deprived Petitioner of His Due Process Right to a Fair Trial	18
III. The Panel's Opinion in this Case Conflicts with Longstanding Precedent of the United States Supreme Court	19
IV. The *Guest* Panel's Decision Conflicts with the Law Of Other Circuits	22
V. The Seventh Circuit Panel's Decision in *Guest* Conflicts with the Illinois Supreme Court's Decision in a Similar Judicial Bias Case	28
Conclusion	30

* *Mr. Halpern's application for admission to the Bar of the Court is pending. Ms. Goldman has been admitted to the Bar of the Court.*

TABLE OF CITED AUTHORITIES

Page

CASES

Aetna Life Insurance Co. v. Lavoie,
475 U.S. 813 (1986) 20, 22, 29

American Cyanamid Co. v. Federal Trade Com.,
363 F.2d 757 (6th Cir. 2001) 28

Arizona v. Fulminante,
499 U.S. 279 (1991) 14, 20

Army and Air Force Exchange Service v. Sheehan,
456 U.S. 728 (1982) 13

Bobo v. United States,
185 Fed. Appx. 885 (11th Cir. 2006) 26

In re Boston's Children First,
244 F.3d 164 (1st Cir. 2001) 27

Bracy v. Gramley,
81 F.3d 684 (7th Cir. 1996) 14

Bracy v. Gramley,
520 U.S. 899 (1997) ..... *passim*

Bracy v. Schomig ("Bracy II"),
286 F.3d 406 (7th Cir. 2002), *cert. denied*,
537 U.S. 944 (2002) 14, 15, 16, 17

Cartalino v. Washington,
122 F.3d 8 (7th Cir. 1997) 23

Cited Authorities

Page

Chapman v. California,
386 U.S. 18 (1967) 19

Del Vecchio v. Illinois Dept. of Corrections,
31 F.3d 1363 (7th Cir. 1994) 23

Exxon Corp. v. Heinze,
32 F.3d 1399 (9th Cir. 1993) 25

Franklin v. McCaughtry,
398 F.3d 955 (7th Cir. 2005) 23

Guest v. Illinois,
516 U.S. 1176 (1996) 3

Guest v. Page,
2004 U.S. Dist. LEXIS 4678
(N.D. Ill. March 22, 2004) 4, 12

Guest v. McCann,
474 F.3d 926 (7th Cir. 2007) ..... *passim*

Harris v. Missouri,
960 F.2d 738 (8th Cir. 1992) 28

Johnson v. Carroll,
369 F.3d 253 (3d Cir. 2004) 23, 24

Johnson v. Mississippi,
403 U.S. 212 (1971) 19

Jones v. Flowers,
547 U.S. 220 (2006) 13

Cited Authorities

Page

Liljeberg v. Health Services Acquisition Corp.,
486 U.S. 847 (1987) 22, 24, 25

Lyell v. Renico,
470 F.3d 1177 (6th Cir. 2006) 25

Mayberry v. Pennsylvania,
400 U.S. 455 (1971) 20, 21

Mitchell v. Maynard,
80 F.3d 1433 (10th Cir. 1996) 23-24

In re Murchison,
349 U.S. 133 (1955) ..... *passim*

People v. Friedman,
494 N.E.2d 760 (Ill. 1986) 11

People v. Guest,
503 N.E.2d 255 (Ill. 1986) 2

People v. Guest,
655 N.E.2d 873 (Ill. 1995) 3

People v. Hawkins,
181 Ill. 2d 41 (Ill. 1998) 28, 29, 30

Peters v. Kiff,
407 U.S. 493 (1972) 21

Offutt v. United States,
348 U.S. 11 (1954) 19, 20, 21, 27

Cited Authorities

Page

Tumey v. Ohio,
273 U.S. 510 (1927) ..... *passim*

United States of America v. Jordan,
49 F.3d 152 (5th Cir. 1995) 25, 26

United States v. Edwardo-Franco,
885 F.2d 1002 (2d Cir. 1989) 27

United States v. Feldman,
983 F.2d 144 (9th Cir. 1992) 26

United States v. Maloney,
71 F.3d 645 (7th Cir. 1995) 6

United States v. Mikalajunas,
1992 U.S. App. LEXIS 21054 (4th Cir. 1992) ... 24, 25

Vasquez v. Hillery,
474 U.S. 254 (1986) 20

Ward v. Village of Monroeville,
409 U.S. 57 (1972) 19, 20, 22, 29

Welch v. Sirmons,
451 F.3d 675 (10th Cir. 2006) 24

Winthrow v. Larkin,
421 U.S. 35 (1975) 19

Cited Authorities

Page

UNITED STATES CONSTITUTION

Fourteenth Amendment ..... i, 2

STATUTES AND RULES

28 U.S.C. § 455(a) 26

28 U.S.C. § 1254(1) 1

Rule 10(a) 1, 13

Rule 10(c) 1, 13

TABLE OF APPENDICES

Page

Appendix A 1a

Appendix B 13a

Appendix C 15a

Anthony Guest requests this Court to issue a writ of *certiorari* to review the decision of the United States Court of Appeals for the Seventh Circuit, denying him *habeas* relief.

OPINIONS BELOW

The Opinion of the Seventh Circuit is reported at 474 F.3d 926 and is reprinted at App., 1a–12a. The Seventh Circuit's Order denying rehearing is found at App., 13a-14a. The Opinion of the District Court for the Northern District of Illinois, Eastern Division is unreported and a copy of the Memorandum Opinion and Order is found at App. 15a-32a. The Illinois Supreme Court's 1995 Opinion denying *habeas* relief is reported at 655 N.E.2d 873.

JURISDICTION

The judgment of the Seventh Circuit was entered on January 18, 2007. On March 12, 2007, a timely petition for rehearing *en banc* was denied. This petition is being filed on or before June 11, 2007. Therefore, this Court has jurisdiction under 28 U.S.C. § 1254(1).

This petition states two grounds for *certiorari*:

> (1) the Seventh Circuit has decided an important federal question in a way that conflicts with relevant decisions of this court; and (2) the Seventh Circuit has entered a decision in conflict with the decisions of other United States courts of appeals on the same important matter and has decided an important federal question in a way that conflicts with a decision by a state court of last resort.

See Rule 10(a) & (c) of the Supreme Court Rules.

In denying Guest's petition for a writ of *habeas corpus* based exclusively on its finding of an absence of actual bias, the Seventh Circuit misapplied this Court's well-established precedent in judicial bias cases. Moreover, the Seventh Circuit has misapprehended the limitations of *Bracy v. Gramley*, 520 U.S. 899 (1997), and the appropriate standard for cases involving

the judicial appearance of bias, placing it at odds with the decisions in other Circuit courts of appeals and the Illinois Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

This case implicates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Summary of Procedural History

Following a three-day bench trial in June 1983, Judge Maurice Pompey of Cook County Criminal Court in Illinois convicted Anthony Guest of murder and other charges and, a month later, sentenced him to death by electrocution. (S. App. 168, 216-17.)[1] The Illinois Supreme Court affirmed Guest's conviction and sentence but vacated the conviction on two less serious murder charges. *People v. Guest*, 503 N.E.2d 255 (Ill. 1986). After a petition for rehearing was denied, Guest unsuccessfully sought certiorari to the Supreme Court of Illinois in this Court.

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1. "S. App." [page number] refers to the appendix that was filed with the United States Court of Appeals for the Seventh Circuit. "R." refers to the record on appeal. "App." refers to the accompanying Appendix.

Guest filed a post-conviction petition for relief in the Illinois trial court based primarily on claims of ineffective assistance of counsel, which was denied in March 1992, without an evidentiary hearing. In May 1995, the Illinois Supreme Court affirmed the dismissal without a hearing. *People v. Guest*, 655 N.E.2d 873 (Ill. 1995). After a petition for rehearing was denied, Guest unsuccessfully sought certiorari to the Illinois Supreme Court of Illinois in this Court. *Guest v. Illinois*, 516 U.S. 1176 (1996).

In April 1997, the Illinois Supreme Court entered an Order staying Guest's execution pending resolution of his petition for a writ of habeas corpus. Guest filed his petition that month in the United States District Court for the Northern District of Illinois and amended it in September 1998. In addition to claims concerning his death sentence, Guest asserted that: (i) he had been denied his right to a fair trial before an impartial judge; and (ii) he had received ineffective assistance of counsel. Guest's *habeas* claim that his due process right to a fair trial was violated because of judicial bias followed the federal corruption trial — and conviction — of Cook County Judge Thomas Maloney in March 1993, during which extensive evidence of Judge Pompey's judicial corruption surfaced.

In September 1997, the District Court granted Guest's motion for discovery on the issue of judicial bias in his case. The District Court's discovery order followed this Court's authorization of discovery in another Seventh Circuit judicial bias case. *See Bracy*, 520 U.S. 899.

On January 11, 2003, then-Governor George Ryan granted Guest clemency and removed the penalty of death as a possible legal consequence of his offense. As a result of the clemency order, Guest's death penalty claims in his *habeas* petition were mooted.

In his amended *habeas* petition, as later supplemented, Guest asserted that: (i) he was denied his right to a fair trial because his trial was held before a corrupt and biased judge;

and (ii) his trial counsel provided ineffective assistance. In March 2004, Guest's *habeas* petition was denied, but the District Court took note of the wealth of compelling evidence of Judge Pompey's corruption. The District Court determined, first, that the evidence of Pompey's corruption had rebutted the presumption that public officials have properly discharged their official duties. *Guest v. Page*, 2004 U.S. Dist. Lexis 4678, *18 (N.D. Ill. March 22, 2004). The evidence that the District Court identified included "numerous witnesses with first-hand knowledge [who] testified that Judge Pompey routinely accepted bribes and fixed cases" and the "alarming" testimony that Judge Pompey's personal bailiff, Lucius Robinson, "[had] passed bribes to the judge on hundreds of occasions." *Id.* at *19. In sum, the District Court recognized that "Guest's counsel [had] unearthed a considerable amount of distressing evidence that casts serious doubt on Judge Pompey's integrity." *Id.* at *18.

In March 2005, the Seventh Circuit granted a certificate of appealability on the issue whether Guest was denied his constitutional right to an impartial trial judge. (S. App. 1.)

In his appeal to the Seventh Circuit, Guest argued that, because Judge Pompey had long orchestrated an extensive courthouse bribery scheme and was aware that he was under investigation at the time of Guest's capital murder trial, he had a substantial – and disqualifying — interest in the outcome of Guest's trial proceedings, his interest constituted presumptive bias, in violation of the Due Process Clause, he was constitutionally barred him from presiding over Guest's case and the judgment in the case should be vacated. (Guest also argued, separately, that Judge Guest's actual bias was demonstrated through his judicial rulings and other conduct at Guest's trial.)[2]

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2. As the evidence of his historical corruption made clear, part of Judge Pompey's *modus operandi* was for the defendant in Judge Pompey's courtroom to waive a jury trial in favor of Judge Pompey's presiding as both judge and jury.

On January 18, 2007, the Seventh Circuit affirmed the District Court's judgment denying Guest's habeas petition. The Seventh Circuit held that Guest's examples of Judge Pompey's trial rulings and other conduct did not demonstrate "actual bias." The panel failed to consider, however, Guest's fundamental due process claim that Judge Pompey held "an interest in the outcome of this trial proceedings" and therefore was presumptively biased and should have been barred from presiding over Guest's trial. *See Guest v. McCann*, 474 F.3d 926, 933 (7th Cir. 2007). Guest argued that, independent of actual bias, Judge Pompey was presumed biased because of a temptation to divert the glare of the FBI's attention away from himself while he was presiding over Guest's capital murder case. Unlike the issue of actual bias, no mention is made in the Seventh Circuit's opinion of Guest's argument on presumed bias.

Guest timely filed a petition for rehearing *en banc* on the ground that the Seventh Circuit panel failed to address its due process claim, and the Seventh Circuit subsequently denied the petition in a summary Order, on March 12, 2007.

This petition for writ of certiorari follows.

II. Factual Background

A. Nature and Scope of the Evidence Against Judge Pompey

The evidence demonstrates that, by the time Anthony Guest appeared for a bench trial before Judge Pompey on capital murder charges, in June 1983, Judge Pompey was well aware of his roles in two related areas of heightened personal concern: (i) an orchestrator and principal beneficiary of a longstanding judicial bribery in the Cook County, Illinois court system; and (ii) a subject of the FBI's investigation of judicial corruption in Cook County. The evidence of Judge Pompey's corruption arose from a multi-year FBI investigation of judicial corruption in Cook County, which became known as Operation Greylord. The FBI investigation generated indictments against 92 officials,

nearly all of whom were convicted, including 17 judges, 48 lawyers, 8 policemen, 10 deputy sheriffs, 8 court officials and one state legislator. Bribe payments routinely were exchanged in courthouse bathrooms, elevators, jury rooms, hallways and stairwells. (S. App. 266A.) Case-fixing was so blatant and widespread that it was not uncommon for attorneys to stuff cash-filled envelopes into judges' mailboxes.

The evidence of Judge Pompey's corruption principally came to light at the federal racketeering and corruption trial of another Cook County Judge, Thomas Maloney, nearly 10 years after Judge Pompey resigned from the bench, in December 1983. *United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995). Maloney was convicted of racketeering, conspiracy, extortion and obstruction of justice. *Id.* However, Judge Pompey was never prosecuted. (S. App. 276, 233, 367.)[3]

Nonetheless, the extensive evidence of Pompey's judicial corruption that ultimately surfaced was compelling and adduced in multiple forms, from several independent sources: testimony of multiple witnesses at the Maloney trial, including Judge Pompey's long-serving former deputy, Lucius Robinson; an undercover FBI agent, Terrence Hake; undercover audiotape recordings of corrupt dealings about a case before Judge Pompey; deposition testimony of Robinson, Hake, Pompey and several defense lawyers; and FBI investigative and interview reports.

Robinson testified about the scope, duration and details of his bribery scheme with Judge Pompey, in which Pompey dismissed criminal cases in exchange for cash bribe payments.

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3. But this Court would become aware of Judge Pompey's corruption. The Seventh Circuit stated: "Indeed, in *Bracy v. Gramley*, the United States Supreme Court took note of the evidence against Judge Pompey that surfaced in the investigation of Judge Maloney." 520 U.S. at 907 n.7 ("The Government introduced evidence that Maloney regularly bribed Judge Maurice Pompey and Cook County Deputy Sheriff Lucius Robinson (who would later serve as Maloney's 'bag man')"). *Guest*, 474 F.3d at 932 n.1.

Hake testified about his corrupt conversations with Robinson concerning payoffs for Judge Pompey in exchange for Pompey's dismissing a criminal case Agent assigned to his docket (as part of an undercover sting operation). Hake's testimony at Maloney's trial was supported by audiotape recordings. (*See* S. App. 288-312.)

B. Judge Pompey's Historical Corruption

From the early 1970s until 1983, Judge Pompey operated a corrupt enterprise in the Cook County, Illinois Courthouse in which he accepted cash payoffs in exchange for acquittals, dismissals and other lenient judicial dispositions, from preliminary hearings to felony murder trials. Lucius Robinson, Judge Pompey's personal deputy between 1971 and 1983, testified that "hundreds" of defense lawyers approached Robinson and asked him for "help" on their cases before Judge Pompey and other Cook County judges, in exchange for cash bribes. (S. App. 284, 304, 306-07, 315-16, 332-33, 336; *see also* 417-18, 421-31, 434-36.) Robinson and Judge Pompey together would review the crooked cases and their illegal arrangements, including the amount of the bribe.

Robinson would then inform the defendant's lawyer of the specifics of the deal. Robinson testified that he repeatedly had served as Judge Pompey's "bagman," accepting large sums of cash for the judge from lawyers who paid for the judge's fix, from $500 to $3,500 each, depending on the case. (S. App. 308.) Typically, Robinson would receive the cash payoff in a newspaper or envelope and then hand it over to Judge Pompey. (S. App. 337, 340.) The bribery in Judge Pompey's courtroom was so rampant that court dispositions became a standing joke. Cases that appeared to be dismissed for no legitimate reason were termed dismissals on "motion Lucius," as dubious homage to the role that Judge Pompey's deputy played in the judge's corrupted courtroom. (S. App. 393-95.)

Judge Pompey's inveterate corruption had early origins. The Government had introduced evidence at Maloney's trial that, before he became a judge, Maloney as defense lawyer routinely

bribed Judge Pompey. *Bracy*, 520 U.S. at 906 n.7. Evidence at other Operation Greylord trials and interviews with the FBI established that several defense lawyers and former judges also made payments to Robinson to pass along to Judge Pompey to fix their clients' cases. (S. App. 256H-J, 278, 283-312, 369, 371, 345-54.)

C. Pompey's Judicial Corruption Leading Up to and Around Guest's Trial

Judge Pompey continued to fix felony cases, until the summer of 1983, including at least one notorious murder trial. (S. App. 312, 258-67; *see generally* R. 64, Ex. G (excerpts in S. App. 250-71.)) In August 1982, Pompey presided over *State v. Farmer*, a highly-publicized homicide case in which the defendant was tried for torturing and murdering a drug dealer suspected of being a government informant. Judge Pompey acquitted the defendant, notwithstanding the eyewitness testimony that Farmer stabbed and then shot the victim in the head as he pleaded for his life. (S. App. 270.) Judge Pompey defended his verdict with a summary conclusion: the State had not met its burden "based on the totality of the evidence[.]" *Id.*

Both before and after the *Farmer* case, Judge Pompey's record on felony drug cases for the two years before Guest's trial was particularly noteworthy to the FBI. In 13 felony Class X narcotics cases before Judge Pompey on motion or bench trial between 1981 and 1983, none resulted in a conviction of the most serious charge. (S. App. 258-67; *see generally* R. 64, Ex. G. (excerpts in S. App. 250-71.)) Six cases resulted in outright findings of not guilty; three in *nolles prosequi* after suppression motions; and four of the cases ended with guilty pleas to lesser included offenses. *Id.* Five of the six cases that resulted in findings of not guilty involved the same defense lawyer, who later pled guilty to bribing Judge Pompey and other judges. (*Id.*; S. App. 270.)

Pompey's operation was also captured on audiotape recordings, as part of Operation Greylord. As noted, former FBI

Agent Hake testified about the extensive corrupt dealings — mostly recorded – that he had between October 1982 and August 1983 with Judge Pompey's deputy while posing in his undercover role as a corrupt defense attorney. In particular, Hake testified about an undercover case assigned to Judge Pompey, *People v. Torrez*, which he had fixed by bribing Robinson and Pompey. After Hake made one of the cash payments to Robinson in a handshake, Robinson assured him that he would "see that [Pompey] gets it." Robinson made clear that Judge Pompey hewed closely to his own system for fixing cases on his docket: "[w]e have a way of doing things."[4] (S. App. 301.) Robinson also warned Hake that it would be difficult to fix a case if he waited until it "hit the priority list," which reflected old cases slated for disposition or trial. (S. App. 299-300.) Hake made a total of $1,300 in bribe payments for Pompey to dismiss *Torrez* — $1,000 for Pompey and $300 for Robinson (S. App. 308.) — and thereafter, in March 1983, Pompey made good on his part of the bargain. (*See, e.g.*, S. App. 290, 310-11.)

Pompey's corruption scheme even continued surreptitiously after the start of Guest's case. On June 7, 1983, the day after Guest's bench trial began, Hake held an audio-recorded meeting with Robinson behind Pompey's courtroom (S. App. 288-312) and, later that same day, Robinson asked Hake for the names of the judges who were assigned his cases and offered his help in trying to fix cases with "[t]wo or three [judges] here in this building." (S. App. 312.)

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4. Indeed, a critical element of the Pompey-Robinson corruption scheme was to have defendants waive their right to a jury trial in order to enable Pompey to exercise greater control over their cases. Robinson testified at Maloney's trial that he would advise defendants, based on his experience with Judge Pompey, to proceed with a bench trial. (S. App. 439; *see also* 248-49.) Consistent with the practice in Judge Pompey's courtroom, and after last-minute holding cell encounters with Robinson and a Pompey bailiff, Guest ultimately agreed to waive his fundamental right to have his capital murder case tried by a jury and to have Judge Pompey decide his fate instead. (S. App. 5.)

D. Judge Pompey's Knowledge That He Was Under Investigation

In June 1983, around the time of Guest's trial, and even earlier, Judge Pompey well understood that he was under investigation for his judicial corruption. (*See, e.g.*, R. 152, Ex. 2, 37-42, 54, 79-80.) Specifically, Pompey's longstanding record of extraordinary leniency was under FBI scrutiny. The signs of an investigation were obvious to anyone who had anything to do with Judge Pompey's courthouse. By the time that Guest's capital murder case neared trial, virtually the entire Cook County courthouse was aware of the FBI's investigation. Court files were seized throughout the building. (S. App. 402.) "There was noise in the [courthouse] building that . . . files were being seized all over the place." (S. App. 402.) Indeed, for about the six months leading up to the announcement of the investigation in August 1983, "[s]omebody knew something was afoot in the building." (S. App. 402-03.) That an investigation was underway even earlier than May or June of 1983, was considered entirely likely, and by summer "rumors abounded that there was a massive investigation." (S. App. 406-08.) "People started quitting, disappearing" or "complaining that they were being . . . interrogated. Those kind[s] of rumors were afoot in the building." *Id.*

Investigators were questioning individuals associated with what were referred to as "suspect courtrooms," and "Pompey would have been one of the persons that talk was going about." (S. App. 409.) Guest's trial lawyer testified that, around the time of the Guest trial, he had heard that investigators wanted to interview Robinson. (S. App 403.) According to Guest's trial lawyer, the heat was on "a couple of judges including Pompey;" Pompey himself was aware of the talk. (S. App. 403, 407-09.) As "an intelligent man," Pompey was understood to have heard the talk. (S. App. 409.) It was also clear that Pompey and Robinson had discussed the existence of an investigation before it was announced, and their conversation on the

subject continued after Operation Greylord became public. (*See, e.g.*, R, 152, Ex. 2, 37-42, 54, 79-80.)

Evidence of the FBI's investigation was so clear in the spring of 1983 that it was obvious even to courthouse outsiders. In early May 1983, an indicted defendant advised the authorities that she was aware that certain lawyers and judges in Cook County were under criminal investigation. *See People v. Friedman*, 494 N.E.2d 760 (Ill. 1986). On August 6, 1983, the Operation Greylord investigation was publicly announced. Media reports followed that Judge Pompey was under investigation. (S. App. 279-82.)

In early December 1983, Judge Pompey announced his resignation from the bench. (S. App. 273-74.) His announcement followed a defense motion that challenged Pompey's guilty verdict in a narcotics case, suggesting that Pompey had been influenced by news reports that he was being investigated under Operation Greylord for his past excessive leniency. (S. App. 273.) Judge Pompey personally acknowledged his awareness of a television news report that he was a target of the FBI's Operation Greylord investigation. (S. App. 273-274.)

E. Guest's Trial, Verdict and Sentencing

On June 6, 1983, after separate off-the-record encounters with Judge Pompey's bailiff and others, in his holding cell, Guest ultimately agreed to waive his right to have a jury decide both his verdict and his sentence in his capital murder case and proceed before Judge Pompey only.[5] Judge Pompey asked Guest

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5. One bailiff who stopped by Guest's holding cell assured Guest that "Judge Pompey would be fairer than a jury." Lucius Robinson also stopped by the holding cell to help persuade Guest to waive a jury trial. With Guest's lawyer there too, Robinson told Guest that he worked for Judge Pompey and that he "knew [Pompey] to be a good, fair judge." While Guest remained unpersuaded, Robinson attempted to assure Guest that he "was acting in [Guest's] best interest." To bolster his position, Robinson also told Guest that "he had worked as a bodyguard for

(Cont'd)

a couple of questions about his waiver and confirmed that he had signed the waiver form, but engaged in no substantive colloquy to determine if, in this capital murder case, Guest's waiver of a fundamental constitutional right was knowing, voluntary and intelligent. As a result of the waiver, Judge Pompey personally would constitute the jury at trial and, similarly, he alone would consider the sentencing factors and determine whether to sentence him to die. After three trial days, two live witness and several stipulations, on June 13, 1983, Judge Pompey returned a guilty verdict on charges of intentional, knowing and felony murder, attempted murder, aggravated battery and two counts of unlawful weapons use. Over objections from Guest's lawyer, Judge Pompey refused to provide any specific findings in this capital murder case.

On July 6, 1983, after a brief hearing and four weeks from verdict, Judge Pompey sentenced Guest to death by electrocution.[6]

Just four months after Operation Greylord was made public, Judge Pompey announced his resignation from the bench. (S. App. 279-82.)

(Cont'd)

Mohammed Ali and would not steer a brother in the wrong direction." Guest, at the time, "valued [Robinson's] opinion because [he] felt [Robinson's] connection to the black community made him trustworthy." (S. App. 249.)

6. As noted *supra*, Guest's death sentence continued until January 2003, when then-Illinois Governor George Ryan issued an executive order of clemency, removing death from Guest's sentence. Guest's sentence was then commuted to a term of natural life in prison without the possibility of parole. *Guest*, 2004 US Dist. Lexis 4678.

REASONS FOR GRANTING THE PETITION

This Court should grant petitioner's writ because the Due Process Clause of the Constitution requires that a reviewing court determine, independent of actual bias, if the trial judge held an "interest in the outcome of" Petitioner's capital murder bench trial (*i.e.*, whether there was apparent bias) when the trial judge knew that he was under investigation as a prime subject for his long judicial history of corrupt leniency. In failing to consider apparent bias as an essential component of Guest's overall judicial bias claim, and looking exclusively at actual bias, the Seventh Circuit erred in applying an incorrect legal standard that is inconsistent with the precedent of this Court and the rulings of other Circuits and the Illinois Supreme Court.

Therefore, *certiorari* should be granted on this important question of federal law. *See* Rules 10(a) & (c) of the Supreme Court Rules; *See also Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982) (granting certiorari where the opinion of a United States Court of Appeals "appeared to be in conflict" with this Court's precedents); *Jones v. Flowers*, 547 U.S. 220 (2006) (granting *certiorari* to resolve a conflict among the Circuits and State Supreme Court regarding the Due Process Clause).

Fundamentally absent from the Seventh Circuit's decision was any consideration of whether there existed in Petitioner Guest's case "a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, [and therefore] denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Moreover, the issue of petitioner's writ – the apparent bias of a trial judge presiding over a bench trial, for capital murder – strikes at the heart of the integrity and impartiality of our judicial system and the public's perception of it. The Court has long recognized that the right to an impartial trial judge is among the rights so fundamental that a finding of

judicial bias, even absent actual bias, requires reversal and a new trial. This constitutional principle is far too important to have Guest's judicial bias claim die because the reviewing court failed to find actual bias and separately failed to consider the appearance of bias. *See also Arizona v. Fulminante*, 499 U.S. 279, 290 (1991) (identifying judicial bias as a "structural defect" in the trial process).

ARGUMENT

I. The Panel's Erroneous Decision in *Guest* Reflects a Misapprehension of the *Bracy* "Actual Judicial Bias" Cases of the Seventh Circuit and the United States Supreme Court

The panel's decision in *Guest* arises directly from *Bracy v. Schomig ("Bracy II")*, 286 F.3d 406 (7th Cir. 2002), *cert. denied*, 537 U.S. 944 (2002). In *Bracy II*, the Seventh Circuit candidly acknowledged its collective and divided confusion as to how to decide bias cases involving judicial corruption, in light of this Court's decision in *Bracy*, 520 U.S. 899. *Bracy II*, 286 F.3d at 408, 410. (That Supreme Court decision reversed the Seventh Circuit's earlier decision in *Bracy v. Gramley*, 81 F.3d 684 (7th Cir. 1996), which denied the petitioner's request, as part of his habeas petition, for discovery to prove a judge's *actual bias*. *Bracy*, 520 U.S. at 909-910.) The issue before this Court was limited to whether the petitioner had made a sufficient showing to establish "'good cause,' as required by Habeas Corpus Rule 6(a), for discovery on his *claim of actual judicial bias*." *Id.* at 901 (emphasis added). This Court ruled that the petitioner had made the showing, and the case was remanded for further proceedings. *Bracy II*, 286 F.3d at 408.

In *Bracy* II, a highly divided Seventh Circuit decided the defendant's due process claim by applying this Court's ruling in a habeas matter concerning discovery in an actual bias case. *Id.* However, the *Guest* panel's reliance on *Bracy II* as virtually

the sole legal template to decide Guest's claim of judicial bias is misplaced for several reasons. As a result, an incorrect — and more stringent — legal standard was applied to Guest's due process claim.

First, the panel incorrectly treated Guest's claim of judicial bias as identical to that in *Bracy II*.[7] Although petitioners in both cases asserted due process violations based on actual bias by corrupt trial judges, Guest also argued that there was an appearance of bias. Specifically, he argued that Judge Pompey, his trial judge, had an interest in the outcome of his bench trial that denied him his due process right to a fair trial. Guest identified for the Seventh Circuit a toxic mix of influential factors that constituted a temptation that would lead the judge "not to hold the balance nice, clear and true" between the State and him. *Tumey*, 273 U.S. at 532. As he was presiding over Guest's death penalty case, in a bench trial and at sentencing, Judge Pompey understood that he was under investigation by the FBI for his extensive record of corruptly-induced leniency. At stake were his judicial post, salary and liberty. The panel apparently took no account of these factors and made no mention of them in its decision.[8]

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7. The panel overstates the similarity of the two cases and fails to acknowledge the critical due process argument of presumed bias that Guest asserted. "This case presents an argument almost identical to that in our decision in *Bracy*." *Guest*, 474 F.3d at 933.

8. Apart from disregarding Guest's "presumed bias" argument as an integral component of his judicial bias claim, the panel also misapprehended the actual bias claim that Guest made, and it apparently confused his with the actual bias claim in *Bracy II*. The panel mistakenly characterizes "[t]he gravamen of Guest's judicial bias claim" to be that Judge Pompey "sought to bolster his conviction statistics by exhibiting bias *against* the defendants in certain of his cases in which he had not accepted bribes." *Guest*, 474 F.3d at 931 (emphasis in original). Guest's actual bias claim was more limited; he argued that Judge Pompey had exhibited bias against only him in his case alone.

Instead, in *Bracy II*, the Seventh Circuit interpreted this Court's decision in *Bracy*, as creating a new standard for judicial bias cases that requires a petitioner to prove the higher threshold of actual bias without regard to appearance of bias. Unlike in *Guest*, however, there was no reported claim in *Bracy II* of a similarly toxic mix of temptations facing Judge Pompey, and no reported claim that the *Bracy II* trial judge had a disabling interest in the outcome of the defendant's particular case.

However, the *Bracy II* opinion also reflects the Seventh Circuit's confusion as to the correct standard to apply in such cases.[9] As the Circuit noted, "[o]ur opinions diverge over exactly what the Supreme Court meant when it said that Bracy and Collins must show 'that Maloney was actually biased in *petitioner's own case*.'" *Bracy II*, 286 F.3d at 410 (emphasis in original).

The plurality opinion in *Bracy II* nonetheless reached its decision after a review of black letter Supreme Court precedent: "[t]hese cases tell us that ordinarily 'actual bias' is not required, the appearance of bias is sufficient to disqualify a judge." *Id.* However, the Seventh Circuit continued, "[b]ut because of the language in the Supreme Court case in *Bracy*, we will focus today on actual bias." *Id.* The court then engaged in rhetorical discussion and speculation about the correct standard to apply:

> Our only explanation is that the unique nature of this case may be why we need to look for actual bias. Maybe it is because the appearance of bias — or at least of criminality — is so obvious. It may be that we must be careful to tie our analysis to actual bias in the present case because Maloney was so obviously not concerned with justice in other cases. Whatever the reason, Bracy and Collins have the heavy burden of showing actual bias.

Bracy II, 286 F.3d at 411.

9. Only four of the eleven judges on the court joined the *en banc* decision in its entirety. *Bracy II*, 286 F.3d at 408.

The divisiveness and disagreement within the Circuit is also apparent from one opinion, joined by three other judges, concurring in part and dissenting in part.

> . . . I can find no actual holding in the [Supreme] Court's opinion in this case to the effect that *Tumey* and its progeny are inapposite and that actual bias invariably must be shown.[10] Yes, the Court granted the petitioners the right to discovery so that they might establish actual bias, but in confining the scope of the case to discovery, the Court declined to consider whether proof of actual bias is the only means to relief in a case of judicial corruption.

Bracy II, 286 F.3d at 436 (*citing Bracy*, 519 U.S. 1074 (1997) (J. Rovner, concurring in part and dissenting in part)).

As a result of the Seventh Circuit's misapprehension of the limits of the decision, the Seventh Circuit erred in *Bracy II* and compounded its error by restricting its review in *Guest* to actual bias. As this Court is aware, and as Judge Rovner's separate opinion makes clear, *Bracy* was limited to the specific discovery issue on petitioner's claim of *actual judicial bias*. *Bracy*, 520 U.S. at 901; *Bracy II*, 286 F.3d at 436. There simply is no support in *Bracy* for reviewing judicial bias claims only for actual bias in a case when appearance of bias also is asserted. Indeed, to do so would conflict with this Court's prior decisions and would disregard Guest's appearance of bias claim as a matter of both fact and law. The Seventh Circuit's limited review also deprived Guest of a full and fair consideration of the merits of his due process claim — a claim that strikes at the central premise of our judicial systems and that warrants a new trial.

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10. The excerpted opinion refers to Judge Posner's opinion in the decision, which in turn was joined by two other judges, concurring in part and dissenting in part. *Bracy II*, 286 F.3d at 419.

II. Judge Pompey's Disqualifying Interest in the Outcome of Guest's Death Penalty Case Deprived Petitioner of His Due Process Right to a Fair Trial

In his appeal to the Seventh Circuit, Guest argued that his due process right to a fair trial was violated as a result of the overriding interest that Judge Pompey held in the outcome of his trial. The interest arose because of his history of judicial corruption and because he knew he was a prime target of the investigation. As was later apparent, by the time of Guest's trial, Pompey recognized that the prospect of an indictment loomed large and threatened to jeopardize not only his criminal enterprise but also his judicial post, his livelihood and, even more important, his own liberty.

Guest's death penalty case presented Judge Pompey with an extraordinary opportunity. Because the Guest case would entail no bribe offers, Judge Pompey understood that he was well-positioned to administer some powerful advocacy on his own behalf. As Guest argued, Judge Pompey was primed to lodge a preemptive defense — to thwart the FBI's investigation — by demonstrating that he could come down hard on criminal defendants unlike any other time in his judicial career. Pompey could make the point emphatically by presiding over a bench trial, convicting Guest of capital murder and sentencing Guest to death — something he had never done before. And that is precisely what Pompey proceeded to do.

The temptation that Pompey confronted — and that any other judge under similar circumstances similarly would be expected to confront — is so compelling that bias is required to be presumed. Although such interest is intolerable in any judicial proceeding, its occurrence in a capital murder trial is especially toxic. Because of the "possible temptation" to Judge Pompey "not to hold the balance nice, clear, and true between the state and the accused . . . ," Guest was "denied the due process of law." *See Tumey*, 273 U.S. at 532.

III. The Panel's Opinion in this Case Conflicts with Longstanding Precedent of the United States Supreme Court

It is a bedrock principle of American jurisprudence that defendants — especially defendants facing death — are entitled under the Due Process Clause of the United States Constitution to a fair trial in a fair tribunal. *Bracy*, 520 U.S. 899; *Winthrow v. Larkin*, 421 U.S. 35 (1975); *Johnson v. Mississippi*, 403 U.S. 212 (1971); *In re Murchison*, 349 U.S. 133 (1955). The fundamental right to an impartial judge is rooted in the Due Process Clause, which guarantees that no judge is permitted to preside over a case in which he has an interest in the outcome. *Murchison*, 349 U.S. at 136. No person should be required to stand trial before a judge with a possible temptation to stray from his obligation to discharge his duties honestly and fairly. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). This Court has made emphatic that, at a minimum, due process "clearly requires 'a fair trial in a fair tribunal' before a judge with no actual bias against the defendant *or interest in the outcome of his particular case*." *Bracy*, 520 U.S. at 905 (emphasis added). As this Court has explained, "[O]ur system of law has always endeavored to prevent even the probability of unfairness. . . . [T]o perform its high function in the best way justice must satisfy the appearance of justice." *Murchison*, 349 U.S. at 136 (*citing Tumey*, 273 U.S. at 532; *Offutt*, 348 U.S. at 14).

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Tumey, 273 U.S. at 532.

This Court also has made clear the premium that the Constitution places on a judge's impartiality. *See Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967); *Tumey*, 273 U.S. at 535 (recognizing that the right to an impartial judge is among

the "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"). When the presiding judge is not impartial, however, there is a "structural defect[] in the constitution of the trial mechanism" that "defies analysis by 'harmless error' standards." *Fulminante*, 499 U.S. at 309, *Tumey*, 273 U.S. at 535 (reversal required when judge has financial interest in conviction, despite lack of indication that bias influenced decisions). Relying on *Tumey*, this Court has made clear the high importance of judicial neutrality and the need to take remedial measures when appropriate:

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired.

Vasquez v. Hillery, 474 U.S. 254, 263 (1986).

This Court has long held, in a variety of cases, that the appearance of judicial bias constitutes a violation of due process for which a new bias-free trial is warranted. *See, e.g.*, *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) (due process violation where state supreme court justice participated in a decision of an issue similar to that in separate lawsuit to which he was a party); *Ward*, 409 U.S. 57 (due process violation where judge doubling as mayor was empowered to impose fines used in part to pay mayoral salary); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (due process violation where judge presided over criminal contempt trial of individuals who had verbally attacked him); *Offutt*, 348 U.S. 11 (same); *Murchison*, 349 U.S. 133 (due process violation where judge presided over criminal contempt trials of same witnesses whom he had interviewed

while acting as a one-person grand jury); *Tumey*, 273 U.S. 510 (due process violation where judge doubled as mayor who could impose fines to raise town revenues and help pay his salary).

Nor is a due process violation based on the appearance of bias dependent on proof of actual bias. *Peters v. Kiff*, 407 U.S. 493, 502 (1972). In *Peters*, the Court held that although it would be difficult for a white defendant to prove actual harm from being indicted and tried by juries from which black jurors were excluded, the exclusion of jurors based on race denied the defendant his due process of law. The Court reasoned that the jury selection process failed to satisfy the appearance of impartiality, and the appearance of bias tainted the judicial process:

> [E]ven if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias. This rule, too, was well established long before the right to jury trial was made applicable in state trials, and does not depend on it. Thus it has been invoked in trials to a judge, *e.g. Tumey*, 273 U.S. 510; *Murchison*, 329 U.S. 133; *Mayberry*, 400 U.S. 455.

Id. at 502.

Establishing presumed, or apparent, bias and, thus, a due process violation does not turn on a showing of actual bias. The Seventh Circuit panel in *Guest* would appear to have it otherwise. Although such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties, to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt*, 348 U.S. at 14. This Court repeatedly has reaffirmed the principle that

consideration of judicial bias goes beyond any actual harm in a particular case, and "the risk of undermining the public's confidence in the judicial process" must be considered. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1987).

In limiting its inquiry to actual judicial bias, the Seventh Circuit denied Guest a full and fair due process claim. In addition, the Seventh Circuit opinion poses the risk that claims involving the "appearance of bias" will be rendered obsolete, or at least irrelevant, in direct contradiction of the rulings from a long line of this Court's cases. *See, e.g., Aetna*, 475 U.S. 813; *Ward*, 409 U.S. 57; *Murchison*, 349 U.S. 133; *Tumey*, 273 U.S. 510. At a minimum, the panel should have considered whether, in *Guest*, the combined circumstances of petitioner's case and the judge's untenable situation created "a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true." *See Tumey*, 273 U.S. at 532; *see also Ward*, 409 US at 60. This the *Guest* panel did not do.

IV. The *Guest* Panel's Decision Conflicts with the Law Of Other Circuits

Several rulings from other circuits highlight the *Guest* panel's departure from important legal principles of due process that have been implemented to safeguard the integrity of the judicial process. At the core of these decisions is the principle that the sanctity of the law, the integrity of the judicial system and the public's confidence must remain inviolate. A reviewing court's consideration of a petitioner's claim of apparent bias is critical to upholding that principle.

Most of the circuits consider the appearance of bias an important due process issue that merits careful attention and review. The Seventh Circuit itself has recognized in the past that the appearance of bias can violate the due process guarantee

of a fair trial. *See Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1375 (7th Cir. 1994) ("Disqualification is required only when the biasing influence . . . is so strong that we may presume actual bias"); *Cartalino v. Washington*, 122 F.3d 8 (7th Cir. 1997) (quoting *Del Vecchio*, 31 F.3d at 1380) ("[b]ut we noted in *Del Vecchio* an exception, well established in the Supreme Court's cases (*see, e.g.*, *Tumey*, 273 U.S. at 535), for 'a possible temptation so severe that we might presume an actual, substantial incentive to be biased'"); *see also Franklin v. McCaughtry*, 398 F.3d 955, 961 (7th Cir. 2005) (finding actual bias but recognizing that "the Supreme Court has decided that both actual bias and the appearance of bias violate due process principles"). Thus, the Seventh Circuit's refusal to consider the appearance of a bias claim in *Guest* appears to represent a departure from its own jurisprudence.

By contrast, the Third Circuit is generally dismissive of apparent bias claims. In the Third Circuit, the appearance of a trial judge's bias, without more, has been held not to violate the Due Process Clause. *Johnson v. Carroll*, 369 F.3d 253 (3d Cir. 2004). The Third Circuit's treatment of appearance of bias claims conflicts with that of other circuits — and of the Supreme Court. The Circuit has reached its position based on its interpretation that: (i) the Supreme Court never held that an appearance of bias violates due process (*Id.* at 259); (ii) the holdings of *Murchison* and certain of its progeny are limited to their facts; and (iii) the Court's discussion of the "basic requirements of due process" as part of a fair trial is only *dicta*. *Id.* at 260, quoting *Murchison*, 349 U.S. at 136. The Third Circuit also relied on the Seventh Circuit's decision in *Del Vecchio*, 31 F.3d 1363.

The Tenth Circuit has sent mixed messages in addressing appearance of bias claims. On the one hand, it has acknowledged the well-established legal principles of "prevent[ing] even the probability of unfairness" and of being mindful that charges of prejudice leveled at trial judges "should not be casually treated by a reviewing court." *Mitchell v. Maynard*, 80 F.3d 1433, 1450

(10th Cir. 1996) (citations omitted). In *Mitchell, the* court held that, where the judge had accepted and dismissed all prison cases in one fell swoop, and also had uttered "expressions of disapproval," it was appropriate to reassign the cases to prevent the "probability of unfairness or the appearance of impropriety." *Id.* at 1450.

On the other hand, more recently, in *Welch v. Sirmons*, 451 F.3d 675, 700-01 (10th Cir. 2006), the Tenth Circuit's principle of the "appearance of impropriety" appears to have sustained at least a setback, if not outright abandonment. In reviewing a habeas petition, the *Welch* court denied the criminal defendant's claim that an appearance of bias existed because the judge's son was the lead detective on the case. *Id.* at 698-701. As the *Guest* panel did in the instant case, the Tenth Circuit failed to find *actual* bias and declined to find a due process violation. No consideration was taken of the trial court's appearance of bias, based on the judge's interest in the outcome of the defendant's trial. In declining to consider whether there was an appearance of bias, the Tenth Circuit specifically referred to the Third Circuit's ruling in *Johnson v. Carroll. Id.*

Other circuits have exhibited more uniformity in their respect for the risk that an appearance of judicial bias poses to a defendant's right to due process and the judicial system as a whole. The Fourth Circuit has held that a perception about the impaired integrity of the law and judicial system could result from a judge's apparent bias, even when it is not directed at the defendant. *United States v. Mikalajunas*, 1992 U.S. App. Lexis 21054 (4th Cir. 1992). As the Fourth Circuit noted, citing *Liljeberg*, 486 U.S. at 864.

> [t]h[e] appearance of propriety is as important to public confidence in our judicial system as actual fairness. 'To perform its high function in the best way, justice must satisfy the appearance of justice.'

> This is especially so in criminal cases where the government seeks to deprive a person of liberty or property.

Mikalajunas, 1992 U.S. App. Lexis 21054, *11.[11]

In *Mikalajunas*, the Fourth Circuit determined that the sentencing judge was presumed biased, and it reassigned the case to a different judge for re-sentencing. The court's determination was based on the judge's strong criticism of the Circuit for vacating the original sentence while the judge, on remand, imposed the identical sentence, even though it was lawful the second time it was imposed. The Fourth Circuit identified its dual concerns: that the trial judge's comments called the integrity of the judiciary into question and that the perception of the court's compromised integrity could not be cured. "The error was one affecting public perception, and despite the lawful sentence, the perception still remained one of judicial disregard for the law." *Id.*

In *United States v. Jordan*, 49 F.3d 152 (5th Cir. 1995), the Fifth Circuit stressed the importance of the appearance of

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11. While the instant case does not directly implicate 28 U.S.C. § 455(a), such statutory cases are instructive in the current case because the text of § 455 and the considerations in a due process violation are based on similar concerns. *See Exxon Corp. v. Heinze*, 32 F.3d 1399 (9th Cir. 1993) ("We agree that 'the Due Process Clause entitles a person to an impartial and disinterested tribunal' and that like the more stringent federal judge's disqualification statute, 28 U.S.C. § 455, the Constitution is concerned not only with actual bias but also with 'the appearance of justice.'"); *Lyell v. Renico*, 470 F.3d 1177 (6th Cir. 2006) ("[T]his court has relied on the [Supreme Court] decision [addressing the statutory recusal standards under § 455] in assessing judicial bias claims under the Due Process Clause.") (internal citations omitted). In interpreting section 455, this Court noted "[t]he very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."); *Liljeberg*, 486 U.S. at 865 (*citing* S. Rep. No. 930-419, at 5; H.R. Rep. No. 93-1453 at 5).

impropriety and identified essential questions: (i) "how [do] things appear" to a reasonable person; and (ii) whether a person familiar with the facts would harbor doubts about the impartiality of the tribunal. *Id.* at 156-7. In *Jordan*, the Fifth Circuit held that where the defendant had been involved in an extremely hostile relationship with a person having a long and close friendship with the judge, a reasonable person would question the impartiality of the district judge and her fitness to preside in a case where the defendant's liberty was at stake. *Id.* at 157-158. *See also United States v. Feldman*, 983 F.2d 144 (9th Cir. 1992) (affirming judgment in case under 28 U.S.C. § 455(a), on judge's *sua sponte* partial recusal where judge owned shares in entity that merged with party in case before him; full recusal was warranted, however, to avoid the appearance of bias). Like the judge's interest in *Jordan*, Judge Pompey held an impermissible interest in the outcome of *Guest*'s capital murder case, in which his judicial post, salary and liberty were at risk. The interests of both judges constituted an appearance of bias that should have disqualified them.

In *Bobo v. United States*, 185 Fed. Appx. 885 (11th Cir. 2006), the Eleventh Circuit reviewed a claim of apparent bias and reaffirmed the importance of ensuring the public's confidence in the impartiality of the trial court. The government in *Bobo* had alleged that the trial judge was biased against the prosecution in one case, primarily on the judge's actions in another criminal trial involving the defendant's alleged co-conspirators. *Id.* at 888. The Eleventh Circuit declined to find actual bias, but held that certain conduct by the judge in the "intertwined" case might "give rise to the appearance of . . . a lack of impartiality in the mind of a reasonable member of the public." *Id.* The court underscored the importance of the "appearance of neutrality" and "the interest of eliminating any doubt of judicial fairness," and it remanded the case for reassignment. *Id.* Thus, unlike in *Guest*, even where courts have declined to find actual bias, they have considered the trial judge's conduct for an appearance of bias and imposed remedial

measures to safeguard confidence in the impartiality of the judicial system.

In *In re Boston's Children First*, the First Circuit credited the importance of an objective outsider's perception in apparent bias cases. The court held in that case that the question of a judge's actual impartiality is irrelevant when a reasonable person "might perceive bias to exist." *Id.*, 244 F.3d 164, 177 (1st Cir. 2001). In *Boston's Children First*, the trial judge made comments to the press about the facts of a pending motion. *Id.* at 166. The First Circuit reversed and held that the trial judge's denial of a Section 455(a) recusal motion based on his comments was an abuse of discretion. *Id.* at 164. While emphasizing that its "ruling in no way intimate[d] any actual bias or prejudice on the part of the" trial judge, the First Circuit held that the circumstances suggested that a reasonable person might perceive that such bias existed. *Id.* at 171. The appearance of partiality stems from the "real possibility that the judge's statements may be misinterpreted because of the ambiguity of those statements." *Id.* at 170. Like *Boston's Children First*, in *Guest*, the court declined to find actual bias, but in both cases the issue of the judge's appearance of bias instills in an objective outsider serious doubt about the neutrality of the trial court. The concern is heightened in *Guest*, when the appearance arose in what was a death penalty case at the time.

In examining claims of judicial bias, the Second Circuit noted that "[t]he Supreme Court and Courts of Appeals, including this Court, have emphasized repeatedly that not only must justice be done, it also must appear to be done. In the oft-quoted statement of Justice Frankfurter, 'justice must satisfy the appearance of justice.'" *United States v. Edwardo-Franco*, 885 F.2d 1002, 1005 (2d Cir. 1989) (quoting *Offutt*, 348 U.S. at 14). In *Edwardo-Franco*, the Second Circuit vacated the judgment of four defendants and remanded their case for retrial based on the cumulative effect of several separate factors. These included: (i) questionable rulings (*e.g.*, inadequate inquiry into non-English speaking defendant's waiver of counsel);

(ii) disparaging comments that the judge made at sentencing about the nationality and immigrant status of two defendants; and (iii) the unlawful sentence of 30 years' imprisonment followed by a lifetime term of supervised release that the judge imposed. *Id.* at 1006. *See also American Cyanamid Co. v. Federal Trade Com.*, 363 F.2d 757, 767 (6th Cir. 2001) ("[i]t is fundamental that both unfairness and the appearance of unfairness should be avoided and [w]herever there may be reasonable suspicion of unfairness it is best to disqualify"); *Harris v. Missouri*, 960 F.2d 738, 740 (8th Cir. 1992) (noting that the defendant "failed to show either actual or presumed bias by the trial judge").

Because of the dispute among the Circuits and the different treatment accorded to the appearance of bias in due process claims, the Court should seek to resolve this fundamental and structural issue and grant *certiorari* here.

V. The Seventh Circuit Panel's Decision in *Guest* Conflicts with the Illinois Supreme Court's Decision in a Similar Judicial Bias Case

On a claim of judicial appearance of bias similar to Guest's, the Illinois Supreme Court vacated the judgment and ordered a new trial. *People v. Hawkins*, 181 Ill.2d 41 (Ill. 1998). Like Guest, the defendants in *Hawkins* asserted that they were victims of a corrupt trial judge's compensatory bias as part of the judge's attempt to offset his dubious record of acquittals and dismissals and to thwart their scrutiny. *Id.* at 51-52. In addition, like Judge Pompey in Guest's case, the *Hawkins* trial judge correctly suspected that he was being investigated by the FBI. *Id.* at 52. (The judge in *Hawkins* even returned the bribe because of his concern. *Id.*)

In *Hawkins*, unlike in *Guest*, however, the Illinois Supreme Court considered and applied the Supreme Court's established law on appearance of bias. The Illinois court made clear that "[b]ecause our inquiry is limited to whether [the trial judge] could have been tempted not to hold the balance between the

parties 'nice, clear and true' *defendants need not show actual bias* by the trier of fact in order to be granted a new trial." *Id.* at 51, *citing Aetna*, 475 U.S. at 822; *Ward*, 409 U.S. at 60; *Tumey*, 273 U.S. at 532. (Emphasis added). In stark contrast, the Seventh Circuit in *Guest* failed to inquire about any temptation to Judge Pompey not to be impartial. Moreover, far from determining that Guest "need not show actual bias," the Seventh Circuit in the instant case focused exclusively on actual bias and rejected Guest's due process claim because it failed to find actual bias. *Guest*, 474 F.3d at 932.

The Illinois Supreme Court took clear note of this Court's ruling in *In re Murchison* and its proposition that "due process will sometimes bar trial by judges who have no actual bias and would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Hawkins*, 181 Ill.2d at 51 (*quoting Murchison*, 349 U.S. at 136). Accordingly, the Illinois Supreme Court found that the trial judge in *Hawkins* had an interest in the outcome of the case because the judge "wanted to insure that he did not lose his judicial post and salary as a result of a criminal indictment, and therefore was motivated to return a verdict that would not spark the suspicions of authorities." *Hawkins*, 181 Ill.2d at 51-52. Guest possessed these identical interests, which the Illinois Supreme Court credited in *Hawkins*. Guest asserted these same interests to the Seventh Circuit in his appeal, to no avail. No mention of them was even made in the panel's decision. Contrary to the ruling in *Guest*, the Illinois Supreme Court in *Hawkins* held that these same judicial interests entitled the defendants to a new trial because their due process rights to a fair trial in a fair tribunal had been violated. *Hawkins*, 181 Ill.2d at 52.

Because *Guest* conflicts with *Hawkins* on similar claims of two trial judges' appearance of bias (while both judges correctly suspected they were under investigation for judicial corruption), and because Guest would have been awarded a new trial under *Hawkins* had the Illinois Supreme Court reviewed his claim instead, the Court should grant Guest's petition for *certiorari*.

CONCLUSION

For the foregoing reasons, petitioner Anthony Guest respectfully requests that this Court grant review of this matter.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-3736
Argued September 11, 2006
Decided January 18, 2007

ANTHONY GUEST,

Petitioner-Appellant,

—v.—

TERRY MCCANN, Warden,

Respondent-Appellee.

Linda T. Coberly, Winston & Strawn, Chicago, IL USA; Jonathan N. Halpern, Winston & Strawn, New York, NY USA, *for Petitioner-Appellant Anthony Guest.*

Marie Quinlivan Czech, Office of the Cook County State's Attorney, Chicago, IL USA, *for Respondent-Appellee Terry L. McCann, Warden.*

Before RIPPLE, KANNE, AND WILLIAMS, Circuit Judges.

WILLIAMS, *Circuit Judge*. In this appeal, Anthony Guest asks us to overturn his murder conviction because of his contention that the trial judge was biased and denied him a fair trial. After extensive discovery in the district court, Guest was able to produce substantial evidence indicating corruption on the part of the trial judge. However, Guest has produced no evidence that the judge's corruption tainted his trial. For this reason, as discussed in more detail below, we affirm the judgment of the district court.

I. BACKGROUND

In 1983, Anthony Guest was convicted of aggravated battery, unlawful use of weapons, attempted murder, and three counts of murder after a bench trial before Judge Maurice Pompey in the Circuit Court of Cook County, Illinois. At trial, two eyewitnesses testified against Guest. One of the witnesses, Ferris King, was a security guard at the Jewel grocery store where the crimes took place. King testified that he approached Guest and identified himself as a security guard after he observed Guest shoplifting toothpaste. King asked Guest to come with him to the Jewel store's security office, which was in the store's basement. When they reached the security office, Guest refused to be searched and pulled a gun out of his pocket. King stated that Guest could keep the items and began to walk towards the adjoining employee cafeteria, with Guest following him. When the two men entered the cafeteria, three other Jewel employees were already sitting there—Joanne Bailey, Marlean Washington, and Gary Henderson.

After seeing Guest pointing a gun at King, Joanne Bailey attempted to flee. Guest shot at her and missed. King then fired a shot at Guest, but missed, and Guest

responded by shooting King in the shoulder. Guest then ran out of the cafeteria and escaped. Later, the body of another Jewel employee, John Geever, was found in the basement, dead as a result of a gunshot wound. No witnesses saw Geever being shot.

Guest had entered the Jewel store with a friend named John Marlow, who was not involved in the shootings. Marlow did not leave the store after Guest fled the scene, but remained and assisted the Chicago Police Department by identifying Guest. The day after the shootings, all four of the Jewel employees who had been in the cafeteria identified Guest in a photo array. Guest remained a fugitive for a year, but after he was apprehended, King and Washington both identified him in a lineup.

At the trial, both King and Bailey identified Guest as the shooter, and the defense stipulated that the other two Jewel employees would also identify Guest as the shooter. The defense also stipulated Geever had not been killed by a bullet from King's gun.

Judge Pompey sentenced Guest to death by electrocution. On appeal, the Illinois Supreme Court affirmed Guest's sentence, while vacating two of his murder convictions that were legally duplicative. Guest unsuccessfully petitioned the United States Supreme Court for a writ of certiorari, and subsequently filed various state post-conviction motions.

In 1997, Guest filed a petition for habeas corpus in the United States District Court for the Northern District of Illinois, raising various claims related to his death sentence and arguing that his right to a fair trial before an impartial judge was infringed and that his trial counsel was constitutionally ineffective. The district court granted Guest extensive discovery on the issue of judicial bias. Guest was allowed to depose Judge Pompey,

Pompey's bailiff, Lucius Robinson, and Guest's attorney during his murder trial, Dennis Tobin. He received transcripts from the trial of a corrupt Cook County judge (Judge Thomas Maloney) and FBI investigation materials related to an operation to uncover judicial corruption known as "Operation Greylord."

Operation Greylord uncovered extensive corruption in the Illinois courts, including bribes being paid to multiple judges in exchange for dismissals. Guest's deposition of Robinson and other evidence uncovered during habeas discovery indicated that Judge Pompey had taken numerous bribes in exchange for favorable rulings in criminal cases. Such was the finding of Judge Hibbler below, who observed that "[e]ven though Judge Pompey's corruption was never exposed in a public trial, Guest's counsel has unearthed a considerable amount of distressing evidence that casts serious doubt on Judge Pompey's integrity."

In 2002, then-Governor George Ryan granted Guest clemency with regard to his execution, mooting the death penalty-related claims in the original habeas petition. Guest filed an amended habeas petition in 2003, asserting only the ineffective assistance of counsel claim and the judicial bias claim. The district court denied the petition on March 24, 2004. Guest now appeals only the district court's judgment on the judicial bias claim.

II. ANALYSIS

A. Procedural Default and Exhaustion

The respondent argues that Guest's judicial bias claim is procedurally barred as a result of his failure to present it in state court. Under 28 U.S.C. § 2254, before a state habeas petitioner is allowed to pursue his claims in fed-

eral court, he must exhaust his remedies in the state courts. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 842-46, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) ("state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process"). In Illinois, this means that a petitioner must have directly appealed to the Illinois Appellate Court and presented the claim in a petition for leave to appeal to the Illinois Supreme Court. *See id.* If a habeas petitioner has not exhausted a claim, and complete exhaustion is no longer available, the claim is procedurally defaulted. *See id.* at 848.

Guest did not present his judicial bias claim to the Illinois state courts and there is no longer time to do so. This means that his claim is defaulted unless he can demonstrate either cause for the default and prejudice or that ignoring the default is necessary to prevent a fundamental miscarriage of justice. *See Badelle v. Correll*, 452 F.3d 648, 661 (7th Cir. 2006). The district court concluded that Guest had demonstrated cause for the failure because the details of Judge Pompey's corruption did not surface until Judge Maloney's 1993 corruption trial, one year after Guest filed his appeal to the Illinois Supreme Court. The district court rejected the respondent's argument, raised again here on appeal, that Guest was put on notice by a newspaper article in 1983 that suggested corruption on the part of Judge Pompey, a grand jury subpoena of Judge Pompey's records, and a statement made in a television report linking Judge Pompey to Operation Greylord.

In order to demonstrate cause for failure to exhaust, Guest must demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *See McCleskey v.*

Zant, 499 U.S. 467, 493, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). The Court in *McCleskey* identified three types of "objective factors" that would constitute sufficient cause: (1) "interference by officials that makes compliance . . . impractical"; (2) constitutionally ineffective assistance of counsel; and (3) "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Id.* The third factor is applicable here. The scattered news items and court filings identified by the respondent were insufficient to put Guest on notice. We cannot say that the factual basis for a judicial bias claim was "reasonably available" to counsel on the basis of the items cited by the respondent. A prisoner is not necessarily expected to be aware of even the most obscure news stories which might expose the basis for a claim of unconstitutional imprisonment. The district court did not address the question of actual prejudice, and we need not either since it is effectively subsumed by Guest's substantive claim. There is no harmless error in a judicial bias case. *See Bracy v. Schomig*, 286 F.3d 406, 414 (7th Cir. 2002).

However, the respondent also argues that Guest could have returned to the state courts after the discovery of new evidence under the Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq.* and advances this as a secondary argument for procedural default. We need not reach this argument because, as explained in detail below, even under the more liberal standard of review applicable where we address issues not adjudicated by the state courts, it is clear that Guest's judicial bias claim fails on the merits.

B. Judicial Bias Claim

In adjudicating section 2254 claims, we are generally bound by the deference requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pursuant to AEDPA, a state habeas petitioner can succeed if he demonstrates that the state court judgment was either contrary to or an unreasonable application of federal law. 28 U.S.C. § 2254(d)(1). However, for the reasons discussed above, in this case there is no state court decision on the merits of the issue at hand. We are thus required to "dispose of the matter as law and justice require." *See Harrison v. McBride*, 428 F.3d 652, 665 (7th Cir. 2006) (citing 28 U.S.C. § 2243). To qualify for a writ of habeas corpus, Guest must demonstrate that "he is in custody in violation of the Constitution or laws or treaties of the United States." *See id.* at 665 (quoting 28 U.S.C. § 2254).

The Supreme Court has observed that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); *see also McBride*, 428 F.3d at 667 ("Fairness of course requires an absence of actual bias in the trial of cases. . ."). As we stated in *McBride*, "due process is violated when a judge presides in a case that 'would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant' or would 'lead him not to hold the balance nice, clear, and true between the state and the accused.' " *Id.* (quoting *Tumey v. State of Ohio*, 273 U.S 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927)).

Guest alleges that Judge Pompey's rulings were unduly harsh, exhibiting bias; he specifically identifies Judge Pompey's actions: (1) "inducing Guest to waive his *Sixth Amendment* right to a jury trial"; (2) "failing to

determine that Guest's waiver was [not] knowing and voluntary"; (3) "failing to declare a mistrial or, alternatively, a continuance for a hearing to determine what happened to possibly exculpatory evidence"; (4) "curtailing cross-examination of a State witness on key testimony about the timing and duration of critical events"; and (5) "returning guilty verdicts on multiple counts of murder (and refusing to provide specific findings of fact) notwithstanding a weak case from the State and inexplicably missing evidence."

The gravamen of Guest's judicial bias claim is that as Operation Greylord approached a climax and Judge Pompey became aware of his possible indictment, he sought to bolster his conviction statistics by exhibiting bias *against* the defendants in certain of his cases in which he had not accepted bribes. This "compensatory bias" theory, which reaches deep into the very psyche of Judge Pompey for its essential premise, depends on four principal types of evidence uncovered by Guest during his investigation: (1) testimony from Robinson (Judge Pompey's bailiff) that he passed bribes to Judge Pompey on "hundreds" of occasions; (2) testimony from a former federal prosecutor involved in Operation Greylord that Judge Pompey was involved in significant corruption; (3) evidence from FBI files implicating Judge Pompey as a bribe-taker; and (4) evidence from the U.S. Attorney's Office files implicating Judge Pompey. We need not engage in an exhaustive discussion of this evidence. It is clear from the record that, as Judge Hibbler found, Judge Pompey was almost certainly involved in significant bribe-taking and corruption during his time on the bench.[1] The only major source of factual disagreement

[1] Indeed, in *Bracy v. Gramley*, the United States Supreme Court took note of the evidence against Judge Pompey that surfaced in the investigation of Judge Maloney. 520 U.S. 899, 907 n. 7, 117 S.

on this point between the district court and Guest stems from the district court's conclusion that there was little evidence of corruption around the time of Guest's trial. Judge Hibbler found that most of the evidence related to an earlier period in Judge Pompey's career—the time when he was presiding over the Cook County preliminary hearing courtroom. Guest argues that the evidence suggests that Judge Pompey was engaged in bribe-taking contemporaneously with his trial.

The district court relied on our decision in *Bracy v. Schomig*, 286 F.3d 406, 408 (7th Cir. 2002),[2] in concluding that Guest's evidence was insufficient to succeed on his compensatory bias claim. In *Bracy*, this court, sitting *en banc*, vacated the sentences but allowed the convictions to stand of two individuals who were tried before Judge Maloney. Unlike Judge Pompey, Judge Maloney was actually convicted of taking bribes, and his conviction was for activity that occurred contemporaneously with the petitioners' trials. The petitioners in *Bracy* asserted the same type of compensatory bias theory asserted here by Guest. Just as the district court concluded with respect to Judge Pompey in the instant case, we found in *Bracy* that "Maloney is not entitled to the usual presumption that ordinarily informs judicial bias cases—a presumption that public officials have 'properly discharged their official duties.' " *Id.* at 409 (quoting *United States v. Chem. Found.*, 272 U.S. 1, 15, 47 S.

Ct. 1793, 138 L. Ed. 2d 97 (1997) ("The Government introduced evidence that Maloney regularly bribed Judge Maurice Pompey and Cook County Deputy Sheriff Lucius Robinson (who would later serve as Maloney's 'bag man')").

[2] *Bracy v. Schomig* was decided on remand from the Supreme Court, which reversed our earlier decision and found that the petitioners were entitled to discovery on their bias claims. *See Bracy v. Gramley*, 520 U.S. at 908-09.

Ct. 1, 71 L. Ed. 131 (1926)). Nevertheless, we concluded that "the fact that Maloney was so exceedingly corrupt does not support a *per se* finding that every case over which he presided was infected." *Id.* at 410. We observed that a petitioner pressing a judicial bias claim must demonstrate that the judge was "actually biased in petitioner's own case." *Id.* (quoting *Bracy v. Gramley*, 520 U.S. at 909).[3] In attempting to do so, the petitioners in *Bracy* pointed out minor unfavorable rulings on various evidentiary issues. We observed that "[f]indings of this sort, which judges often make favoring a law enforcement version of conflicting events, do not support a claim of actual bias." *See id.* at 415.

Bracy dictates that Guest's claims must fail. At both ends of the case, Guest's judicial bias claim is weaker than that of the petitioners in *Bracy*. There was substantially more evidence of corruption on the part of Judge Maloney (contemporaneous corruption) than Judge Pompey, and Guest has not introduced anything in the manner of a suspicious evidentiary ruling pointing to "actual bias" in his case. It is circular for Guest to argue that Judge Pompey's decision to return a guilty verdict is evidence of bias, particularly when overwhelming evidence of his guilt was admitted at the trial. This evidence included: (1) the live testimony of King and Bailey that Guest was the shooter in the basement; (2) the stipulated identifications of Guest by the other two

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[3] Judge Evans's opinion for the court, sitting *en banc*, also noted that there was substantial disagreement within the court on several questions related to the meaning of this phrase (Judges Posner and Rovner both filed opinions concurring in part and dissenting in part, with five other judges joining these separate opinions). *Bracy v. Schomig*, 286 F.3d at 409. However, none of the disagreement referenced by Judge Evans's opinion is relevant to the resolution of this case.

Jewel employees; (3) testimony that all four Jewel employees identified Guest in a photo array the day after the shootings; and (4) the stipulated firearm analysis indicating that security guard King's gun (the only other gun that was fired in the basement) was not the source of the bullet that killed Geever. At the conclusion of the trial, the prosecution had certainly proved Guest's guilty beyond a reasonable doubt.[4]

Similarly, even assuming that Robinson induced Guest to waive his right to a jury trial, Robinson's actions would not demonstrate bias on the part of Judge Pompey. Actions that are inexplicable in the absence of a questionable motive constitute circumstantial evidence of judicial bias. But Robinson may have truly believed that Guest was more likely to receive a favorable ruling from Judge Pompey than from a jury. Even if he did not believe this, his motivations tell us nothing about the bias of Judge Pompey. Guest cannot point to any evidence in the record supporting the theory that Robinson induced the jury waiver in order to make Guest a sacrificial lamb to Judge Pompey's alleged image-building campaign. Relatedly, Guest has not demonstrated that Judge Pompey should have recognized that his jury waiver was involuntary.

The potentially exculpatory "missing evidence" that Guest alleges should have caused Judge Pompey to declare a mistrial consists of a "missing bullet" from a shooting spree Guest engaged in on the day of the murder. The witnesses against Guest testified that he repeatedly fired his gun haphazardly around the Jewel store

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[4] We do not see any inherent evidence of bias in Judge Pompey's failure to make specific findings of fact with regard to Guest's guilt, particularly where, as here, the evidence was overwhelming. Guest's brief fails to cite any authority indicating that Judge Pompey flouted any Illinois procedural requirements.

that was the scene of the crime. Guest argues that testimony at his trial revealed that one of the bullets fell from the security guard he shot while the guard was being treated, and that someone, perhaps a police officer or a doctor, picked it up. The bullet was never retrieved or produced in discovery. Guest argues that we can glean that Judge Pompey was biased from his failure to declare a mistrial. But Guest has uncovered no evidence that the State was ever in possession of the bullet. Moreover, even if the bullet had been retrieved and lost by the State, it had little or no evidentiary value. Scientific examination of the slug would have yielded no information that could contradict Ferris King's testimony that he saw Guest shoot the bullet into his body.

Lastly, Guest points to a series of irrelevant questions that his attorney attempted to ask one of the witnesses that were not allowed by Judge Pompey. The questions Guest identifies are all either irrelevant, inconsequential, or exhibit improper form (*e.g.*, "What did you have for lunch on the day of the shooting?"). The failure to allow them in no way demonstrates bias.

At bottom, all of Guest's allegations and evidence in support thereof do not amount to a successful claim of judicial bias. This case presents an argument almost identical to that in our decision in *Bracy*, the distinction being that Guest has an even weaker case. The *Bracy* petitioners could not succeed in demonstrating bias sufficient to overturn their convictions, and neither can Guest.

III. CONCLUSION

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-3736
Decided March 12, 2007

ANTHONY GUEST,

Petitioner-Appellant,

—v.—

TERRY MCCANN, Warden,

Respondent-Appellee.

Jonathan N. Halpern, Bracewell & Giuliani, New York, NY., *for Petitioner-Appellant Anthony Guest.*

Marie Quinlivan Czech, Office of the Cook County State's Attorney, Chicago, IL USA, *for Respondent-Appellee Terry L. McCann, Warden.*

Before Hon. Kenneth F. Ripple, Circuit Judge, Hon. Michael S. Kanne, Circuit Judge, Hon. Ann Claire Williams, Circuit Judge.

ORDER

On February 1, 2007, the petitioner-appellant filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny rehearing, and none of the judges in active service has requested a vote on the petition for rehearing en banc. The petition is therefore DENIED.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 C 5034
Decided March 22, 2004
Docketed March 23, 2004

UNITED STATES OF AMERICA ex rel.,
ANTHONY GUEST, # N-32658,

Petitioner,

—v.—

THOMAS PAGE, Warden,
Menard Correctional Center,

Respondent.

Richard E. Cunningham, Attorney at Law, Chicago, IL. Jeffrey Urdangen, Northwestern Legal Clinic, Chicago, IL., *for plaintiff Anthony Guest, United States ex rel.*

AUSA, United States Attorney's Office, Chicago, IL. Chief of Criminal Appeals, Illinois Attorney General's Office, Chicago, IL. Marie Quinlivan Czech, Cook County State's Attorney, Chicago, IL., *for defendant Thomas Page, Warden, Menard Correctional Center.*

WILLIAM J. HIBBLER, United States District Court Judge.

MEMORANDUM OPINION AND ORDER

After a bench trial in the Circuit Court of Cook County, petitioner, Anthony Guest ("Guest"), was convicted of murder and sentenced to death. After his direct and post-conviction appeals failed, Guest petitioned this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On January 11, 2003, former Illinois Governor George Ryan commuted Guest's death sentence to natural life in prison without the possibility of parole. Before this court is Guest's petition for a writ of habeas corpus amended after the commutation of his death sentence. For the reasons stated below, the court denies Guest's habeas petition in its entirety.

I. BACKGROUND

A. Procedural History

Following a bench trial before Judge Maurice Pompey in the Circuit Court of Court County, Illinois, Guest was convicted of the murder of John Geever, attempted murder, aggravated battery and two counts of unlawful weapons use. At a separate sentencing hearing, Judge Pompey found Guest eligible for the death penalty on the grounds that Guest had been convicted of a prior California murder, which is a statutory aggravating circumstance. Judge Pompey concluded that there were no mitigating factors sufficient to preclude imposition of the death penalty, and therefore sentenced Guest to death.[1]

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[1] Judge Pompey also sentenced Guest to 30 years for attempted murder. This sentence was to run consecutively to two sentences in

Guest filed a direct appeal with the Illinois Supreme Court, which upheld Guest's conviction and death sentence on December 19, 1986. *People v. Guest*, 115 Ill. 2d 72, 503 N.E.2d 255, 104 Ill. Dec. 698 (1986) (*Guest I*). Guest then filed a post-conviction petition with the Circuit Court of Cook County. On March 11, 1992, the Cook County Circuit Court granted the State's motion to dismiss Guest's post-conviction petition. The Illinois Supreme Court affirmed the Circuit Court's dismissal of Guest's post-conviction petition on May 18, 1995. *People v. Guest*, 166 Ill. 2d 381, 655 N.E.2d 873, 211 Ill. Dec. 490 (1995) (*Guest II*). On April 16, 1997, Guest filed a petition for writ of habeas corpus in this court.

B. Trial Testimony

The following facts, which Guest does not challenge, are drawn from the Illinois Supreme Court's ruling on Guest's direct and post-conviction appeals. 28 U.S.C. § 2254(e)(1); *Mahaffey v. Schomig*, 294 F.3d 907, 915 (7th Cir. 2002) (unless a habeas petitioner provides clear and convincing evidence to the contrary, a determination of a factual issue by a state court is presumed correct for the purposes of habeas review). On February 5, 1981, Guest entered a Chicago grocery store with friend, John Marlow. Ferris King, a security guard, observed Guest place toothpaste and a toothbrush in his pocket. King approached Guest, identified himself, and asked Guest to accompany him to his office located in the basement of the building. Guest complied. When the two men arrived at the office, Guest confronted King with a handgun.

Guest then led King from the office to an employee's cafeteria also located in the basement. Three employ-

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Tennessee for armed robbery and bank robbery and also consecutively to two sentences of 35 years to life imprisonment in Missouri for two armed robberies.

ees—Joanne Bailey, Marlean Washington, and Gary Henderson—were in the cafeteria when the two men entered. When two of the employees attempted to flee, Guest began firing in their direction. King then reached for his gun, exchanged several shots with Guest, and was hit once in the shoulder. Guest then fled down a south corridor, up a flight of stairs, and out the store's front door. King chased Guest but abandoned his pursuit upon finding John Geever, another employee, wounded and lying in the south corridor. Geever subsequently died of a gunshot wound. After the shooting, King detained Marlow, the individual who accompanied Guest to the store. Marlow provided the police with information that established Guest's identity as the gunman.

At trial, Bailey testified that she saw Geever exit the cafeteria shortly before King and Guest arrived. The parties stipulated that if Washington were to testify she would state that she was in the cafeteria with Baily and Henderson when Guest fired the first shot. The parties also stipulated that on the day after the shooting, employees Henderson, King, Bailey, and Washington identified Guest's picture from a photo array, and that King and Washington identified Guest from a lineup before trial. The parties also stipulated that the bullet recovered from Geever's body was not fired from King's gun.

II. MOOT SENTENCING CLAIMS

On January 11, 2003, former Illinois Governor George Ryan commuted Guest's death sentence to natural life in prison without the possibility of parole. Since Guest's commutation, the Illinois Supreme Court has issued decisions on direct appeal and modified decisions on the denial of rehearing in other capital cases. In each case, the Illinois Supreme Court concluded that former Gov-

ernor Ryan's commutation of the defendant's death sentence rendered moot any capital sentencing claims. *See, e.g., People v. Ceja,* 204 Ill.2d 332, 789 N.E.2d 1228, 273 Ill. Dec. 796 (2003) (commutation removes judicially imposed sentence replacing it with a lesser, executively imposed sentence); *People v. Lucas,* 203 Ill.2d 410, 787 N.E.2d 113, 272 Ill. Dec. 298 (2003) (same); *People v. Miller,* 203 Ill.2d 433, 786 N.E.2d 989, 272 Ill. Dec. 155 (2003) (same). The Seventh Circuit has similarly decided the issue. *See, e.g., Wilson v. Mote,* 2003 U.S. App. LEXIS 25966, No. 03-1943, slip. op. at 1 (7th Cir. June 18, 2003) (commutation mooted prisoner's habeas claims based on his death sentence). Accordingly, Guest has amended his habeas petition to delete the claims challenging his death sentence and leaves only two claims for the court to address, each relating to the guilt phase of Guest's trial. The court considers the merits of these claims under the following standards.

III. HABEAS STANDARDS

Under the *Antiterrorism and Effective Death Penalty Act of 1996* ("AEDPA"), a habeas petitioner is not entitled to a writ of habeas corpus unless the challenged state court decision is either "contrary to" or "an unreasonable application of" clearly established federal law as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1); *see also Williams v. Taylor,* 529 U.S. 362, 404-05, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000). A state court's decision is "contrary to" clearly established Supreme Court law "if the state court arrives at a conclusion opposite to that reached by the Court on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite

to ours." *Id.* at 404. To demonstrate an "unreasonable application" of clearly established federal law, a habeas petitioner must establish that the state court unreasonably applied the controlling legal rule to the facts of the case. *Id.* at 407. Moreover, the state court's unreasonable application of Supreme Court precedent must be more than incorrect or erroneous. Rather, it must be "objectively" unreasonable. *Lockyer v. Andrade*, 538 U.S. 63, 123 S. Ct. 1166, 1174, 155 L. Ed. 2d 144 (2003); *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002) (state court decision must lie "well outside the boundaries of permissible differences of opinion.").

IV. PROCEDURAL DEFAULT

Before a federal court will consider a habeas corpus petition, a petitioner must satisfy several procedural requirements. First, a petitioner must exhaust state remedies—this is, the petitioner must give the state's highest court an opportunity to address each claim. *O'Sullivan v. Boerckel*, 526 U.S. 838, 839, 144 L. Ed. 2d 1, 119 S. Ct. 1728 (1999). To satisfy this requirement, a petitioner must fairly present to the state judiciary both the operative facts and legal principles that control each claim. *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001).

Second, the petitioner must comply with state procedural rules to avoid procedurally defaulting his claims. Accordingly, a habeas claim may be procedurally defaulted if the state court rests its judgment on an independent and adequate finding of procedural default under state law. *See Stewart v. Smith*, 536 U.S. 856, 860, 153 L. Ed. 2d 762, 122 S. Ct. 2578 (2002); *see also Wright v. Walls*, 288 F.3d 937, 947 (7th Cir. 2002) (waiver is an independent and adequate state procedural ground in Illinois). Moreover, failure to appeal the dis-

missal of a post-conviction petition in Illinois state court will be treated as an independent and adequate state ground (as if a state court had actually found the claims procedurally barred) preempting further habeas review in federal court. *Boerckel,* 526 U.S. at 839. A federal court, however, may excuse a procedural default if a petitioner can show either cause for the default and actual prejudice as a result of the alleged violation of federal law, or can demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson,* 501 U.S. 722, 750, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991). With these standards in mind, the court will address Guest's claims.

V. GUEST'S HABEAS CLAIMS

A. Ineffective Assistance of Trial Counsel

Guest raised the ineffectiveness of his trial counsel on post-conviction review. The Illinois Supreme Court reviewed the claim's merits and denied relief. *See Guest II,* 655 N.E.2d at 880. Thus, Guest has fully litigated the issue in state court and this court is free to perform its own substantive review under ADEPA's standards.

Guest's ineffective assistance of counsel claim focuses on his counsel's overall representation, rather than on any specific error or omission that his counsel may have made. Guest argues that his lawyer's incompetence was so egregious that it failed to subject the State's case to meaningful adversarial testing. Guest's "meaningful adversarial testing" claim derives from the United States Supreme Court's decision in *United States v. Cronic,* in which the Court acknowledged that certain circumstances are so prejudicial that ineffective assistance of counsel is presumed. 466 U.S. 648, 658-662, 80 L. Ed.

2d 657, 104 S. Ct. 2039. One of the circumstances identified by the *Cronic* Court is when trial counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. *Id.* at 659.

To establish his *Cronic* claim, Guest first criticizes his trial counsel's trial strategy. He claims that trial counsel inappropriately stipulated to the majority of State's evidence, including virtually all adverse witness testimony. Guest further faults his counsel's inability to articulate a viable defense theory or present witnesses on his behalf. Lastly, Guest criticizes trial counsel's performance during opening and closing statements. Specifically, Guest takes issue with his counsel's concessions during opening statements that Guest fired the shots that wounded security guard King. Guest further contends that trial counsel's closing statement was inadequate and wholly unpersuasive.

Pursuant to ADEPA, this court's review begins with Illinois Supreme Court analysis of the claim to determine if that court's decision was contrary to or involved an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1). To reach its conclusion, the court first noted that review of counsel's performance is generally deferential, particularly regarding matters of trial strategy. *See Guest II,* 655 N.E.2d at 879. The court then considered trial counsel's decision to concede Guest's guilt to a number of charges, including aggravated battery, while maintaining his innocence regarding the murder charge. *Id.* at 879-880. The court also reviewed trial counsel's stipulations to many of the State's exhibits and witnesses. *Id.* After thoroughly discussing a number of state and federal decisions, the court concluded that trial counsel's performance did not rise to the level of *per se* ineffectiveness described in *Cronic*. *Id.* at 880. The court finds that the Illinois

Supreme Court's decision represents a reasonable application of *Cronic*.

Generally, broad claims of incompetence do not necessary support an inference that the circumstances were so egregiously prejudicial that ineffective assistance is presumed. *Hollenback v. United States*, 987 F.2d 1272, 1275 (7th Cir. 1993). This is especially true when the criticisms attack counsel's overall trial strategy. *See Strickland,* 466 U.S. 668 at 690, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (counsel's strategic choices do not often support claims of ineffective assistance). While is true that Guest's counsel stipulated to a great deal of adverse evidence, it is also true that much of the evidence against Guest was particularly strong. Perhaps by admitting what could not be denied, Guest's counsel was attempting to buttress his credibility with the judge. *See United States v. Simone*, 931 F.2d 1186, 1194 (7th Cir. 1991) (confronted with overwhelming evidence, it was not unreasonable for counsel to concede the defendant's guilt to lesser drug charges but contest charges which carried greater punishment). The plentiful evidence against Guest's presented counsel with a daunting task. To confront this task, trial counsel decided to contest the most serious charge, while admitting the lesser offenses. While this strategy may not have been perfect, it was not illogical either.

Moreover, the record confirms that counsel did in fact subject the State's case to adversarial testing. For instance, counsel raised repeated objections to the State's failure to produce the bullet fired at security guard King. In fact, counsel moved for a mistrial based on the State's loss of evidence. Counsel also challenged the testimony of State's witnesses, and moved to strike the testimony of at least one witness when that witness testified beyond stipulated statements. Lastly, counsel

pursued his defense theory during trial and during opening and closing statements and cross examined the State's witnesses in a manner consistent with this theory. This is not the type of egregious case where counsel has entirely failed to subject the prosecution's case to meaningful adversarial testing. *See, e.g., Cooks v. Ward,* 165 F.3d 1283, 1296 (10th Cir. 1998) (despite counsel's failures at trial, prejudice could not be presumed where he was present in the courtroom, conducted limited cross-examination, made objections, and gave a closing argument). Accordingly, the court finds that Illinois Supreme Court's decision that trial counsel's assistance was not *per se* ineffective, was consistent with the facts and circumstance of the present case. *See Rice v. McCann,* 339 F.3d 546, 548 (7th Cir. 2003) (reasonable state court application of federal law is at least minimally consistent with facts and circumstances of case). Guest's first claim is therefore denied.

B. Judicial Bias

Guest's second claim is that he was denied a fair trial because Judge Pompey was biased against him. Specifically, Guest claims that Judge Pompey convicted and sentenced him to death to offset his reputation as an usually lenient judge. Before discussing the claim's merits, the court must briefly address whether Guest has procedurally defaulted this claim.[2]

Guest did not raise his judicial bias claim in state court. Generally, this constitutes grounds for procedural default. *O'Sullivan v. Boerckel,* 526 U.S. 838, 839, 144

[2] Arguably, the State has waived this issue as its recently filed memoranda responding to Guest's amended petition does not raise procedural default. But given the considerable passage of time since the State first presented its arguments for procedural default, the court will attribute the State's recent omission to inadvertence.

L. Ed. 2d 1, 119 S. Ct. 1728 (1999) (requiring exhaustion of state remedies). But the exhaustion doctrine is not without exception. A federal court may review a non-exhausted constitutional claim if a petitioner can demonstrate *cause* for the procedural default. *Coleman v. Thompson,* 501 U.S. 722, 750, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991). One well-recognized example of cause occurs when the factual or legal basis of the claim was not reasonably available to the petitioner. *See Murray v. Carrier*, 477 U.S. 478, 488, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986).

The record reveals that the vast majority of evidence relating to Judge Pompey's corruption surfaced during the March 1993 trial and conviction of Judge Thomas Maloney. *See United States v. Maloney,* 71 F.3d 645 (7th Cir. 1995). Judge Maloney was one of many dishonest judges exposed and convicted through "Operation Greylord," a labyrinthine federal investigation of judicial corruption in Chicago. During Judge's Maloney trial, witnesses testified that Judge Pompey was one of the judges who frequently accepted bribes in criminal cases. Before this time, Guest had no real evidence of Judge Pompey's corrupt practice.

The State argues that a 1983 newspaper article alluding to Judge Pompey's possible corruption should have alerted Guest or his counsel of his potential judicial bias claim. But it is not reasonable to assume that Guest or his counsel would have read this single newspaper article, and even if they had, it is highly doubtful that the article's contents would have provided Guest with the necessary facts on which to base a viable constitutional claim. Accordingly, the court finds that Guest was unaware of the facts underlying his judicial bias claim when he filed his post-conviction appeal to the Illinois

Supreme Court in 1992. Guest has therefore demonstrated cause to excuse his procedural default.

Guest's claim raises a form of judicial bias known as "compensatory" bias. This type of bias occurs when a judge, who is taking bribes from some criminal defendants in some cases, engages in a sort of compensatory bias against defendants who do not bribe the judge, so that the judge avoids being perceived as uniformly and suspiciously "soft" on criminal defendants. *See Bracy v. Gramley*, 520 U.S. 899, 905, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997) (*"Bracy I"*) (defining "compensatory" bias). To prove compensatory bias, a petitioner must demonstrate two elements—that the judge was 1) actually biased; and 2) in petitioner's own case. *See Bracy v. Schomig*, 286 F.3d 406, 409 (7th Cir. 2002) (*"Bracy II"*).[3]

But before considering these concepts, the court must address a preliminary issue neglected by the parties. Public officials are generally entitled to a presumption that they have "properly discharged their official duties." *Bracy I* at 909. Accordingly, a petitioner seeking to prove judicial bias in a specific case, must first overcome this presumption of impartiality. *Id.* In *Bracy I*, the Supreme Court found that the presumption had been sufficiently rebutted by the substantial evidence of corruption presented at Judge Maloney's criminal trial and conviction. *Id.* In contrast, charges were never brought against Judge Pompey and his character has never been impeached in an official forum. But, as more fully dis-

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[3] It is not at all clear that the *Bracy II* Court intended to establish a definition of compensatory comprised of two distinct elements. It probably makes more sense to consider the two elements as part of *same* element, but expressing different concepts. But since the parties have presented their evidence and structured their arguments around this interpretation of *Bracy II*, the court sees no harm in organizing its opinion to accord with the parties' understanding.

cussed below, numerous witnesses with first-hand knowledge have testified that Judge Pompey routinely accepted bribes and fixed cases. Even though Judge Pompey's corruption was never exposed in a public trial, Guest's counsel has unearthed a considerable amount of distressing evidence that casts serious doubt on Judge Pompey's integrity. Accordingly, the court finds that Guest has successfully rebutted the presumption of impartiality normally afforded public officials. With the presumption rebutted, the court turns to Guest's compensatory bias claim.

1. Actual Bias

To demonstrate actual bias, a petitioner must do more than show that a judge was actually biased his case. Rather, it appears that the petitioner must establish that the judge engaged in pattern of corruption that extended far beyond the petitioner's specific case. *See Bracy*, 286 F.3d at 410-414, 421-22 (2002). This includes both instances of actual bribe-taking and related compensatory bias. *Id.* This is a difficult hurdle to overcome, and the court has allowed Guest's counsel to conduct extensive discovery to prove his claim. Counsel has inspected U.S. Attorney and FBI files, and deposed numerous witnesses, including court personnel, defense attorneys, a federal prosecutor, and an FBI agent. Although counsel's commendable efforts have revealed much disturbing evidence, the court must conclude that Guest has not satisfied the heavy burden of proving Judge Pompey's actual bias. In reaching this difficult conclusion, the court considered the following evidence.

The U.S. Attorney's files indicate that certain corrupt defense attorneys would routinely have their cases assigned to Judge Pompey. Further, numerous witnesses interviewed by the FBI in connection with a federal

investigation into judicial corruption in Cook County, claim that Judge Pompey routinely accepted cash bribes in exchange for favorable dispositions in serious criminal cases, however most of this testimony references Judge Pompey's practices when he was presiding over the preliminary hearing courtroom. Very little, if any, testimony relates to Judge Pompey's alleged bribe-taking around the time of Guest's trial. Here, the U.S. Attorney and FBI testimony only establishes that Judge Pompey may have accepted bribes at some point in his judicial career, but is quite vague about whether these activities occurred around the time of Guest's trial.

Guest also offers the deposition testimony of numerous witnesses, including defense attorneys, court personnel, and an FBI agent. While this testimony is generally consistent with the FBI and U.S. Attorney evidence, it does not add anything particularly useful. Of these witnesses, Lucius Robinson's testimony is the most alarming. Robinson, who was Judge Pompey's personal bailiff, claims that he passed bribes to the judge on hundreds of occasions. But Robinson's testimony does not include details regarding the parties involved, dates, cases names, or locations of the bribes. In fact, of all these witnesses, the only supported claim of specific bribe-taking comes from the deposition testimony of FBI agent Hake. Hake testifies that he gave Robinson money to influence Judge Pompey in a case that occurred around the time of Guest's murder trial.[4] But even this specific claim is of limited value, as Hake does not say whether Robinson actually delivered the bribe to Judge Pompey or whether Robinson kept the money for himself.

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[4] Hake is referring to the *Torres* case, which was a case contrived by the FBI to catch Robinson and Pompey in the act of bribe-taking.

Guest also presents the statement of former United States Attorney, Scott Mendeloff, who was a federal prosecutor who investigated Judge Pompey's corruption in the late 1980's. Mendeloff's testimony does not provide the court any additional evidence of Judge Pompey's alleged corruption beyond what is already discussed above. Mendeloff merely explains that his interviews with Robinson and various corrupt defense attorneys revealed that these people said that Judge Pompey accepted bribes. This testimony is not only heresay, but is also offered without detail or context.

Finally, without specific references to any discovered evidence, Guest claims that Judge Pompey fixed a number of murder cases around the time of Guest's trial. Guest cites the *Farmer* case, where a "source" apparently told the FBI that payments were made for the defendant's acquittal. Guest also cites the *Cummings* case where Robinson was apparently "signaling" the defendant during trial and the defendant got a light sentence. This evidence is anecdotal and therefore unhelpful.

In sum, the above evidence does not demonstrate Judge Pompey's "actual bias," as those terms are interpreted in *Bracy II*. And perhaps most damaging to Guest's claim is that he does not offer any evidence, direct or circumstantial, admissible or inadmissible, that Judge Pompey ever engaged in compensatory bias. The court must therefore conclude that Guest has not satisfied the first concept of his compensatory bias claim.

2. In Guest's Case

Even if Guest's could somehow establish Judge Pompey's corrupt nature, Guest has provided little, if any, evidence that Judge Pompey engaged in compensatory bias *in his case*. Guest claims his jury waiver was the

product of collusion between Judge Pompey and Robinson so that Judge Pompey could impose the death penalty. But Guest does not provide any credible evidence that the decision to waive the jury was anything but his own voluntary decision. Guest also claims that his death sentence was the first and only time in Judge Pompey's career that he imposed the death sentence and this somehow reveals his corrupted motives. Perhaps Guest's case was the first opportunity Judge Pompey had to impose the death penalty. Or maybe Guest's case was the single most gruesome murder case ever tried before him. Without more information, the Guest's deduction remains mere conjecture.

It is instructive to compare the quality of the above evidence with the evidence available in *Bracy II*. Judge Evans[5] found that Judge Maloney had appointed a defense counsel whom the judge personally knew through his associations with Chicago organized crime families. *See Bracy II*, 286 F.3d at 414. The court also found that Judge Maloney's discretionary decisions during Bracy's sentencing were particularly egregious. *Id.* 416-419. These facts, among others, raised an inference of bias that permitted Judge Evans to conclude that Bracy's sentencing hearing was tainted by Judge Maloney's compensatory bias. *Id.* at 419. The same cannot be said of Guest's evidence, which consists entirely of unsupported speculation. Thus, Guest has also failed to demonstrate that Judge Pompey was biased in his case.

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[5] The Seventh Circuit's decision in *Bracy II* was split into two parts, with each part commanding a majority of the court. The part of the judgment holding that Bracy was entitled to a new sentencing hearing because of compensatory bias was agreed to by eights justices and written by Judge Evans. *See Bracy II*, 286 F.3d at 408.

C. Request For An Evidentiary Hearing

Finally, Guest requests an evidentiary hearing under Section 2254(e)(2), but does not specify what he hopes to accomplish at such a hearing. Federal habeas courts are not an alternative forum for trying issues and facts that a habeas petitioner did not pursue at the state court level. *See Williams*, 529 U.S. at 437; *see also Boyko v. Parke*, 259 F.3d 781, 789-90 (7th Cir. 2001) (federal habeas court's ability to hold evidentiary hearing for petitioner to supplement an underdeveloped state court record is "severely circumscribed"). Section 2254(e)(2) provides that, if a factual basis of a claim was not developed in the state court, the federal habeas court "shall not hold an evidentiary hearing" unless the habeas petitioner can show:

> (A) the claim relied on
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

Rather than develop his argument under the above requirements, Guest cursorily maintains that he is entitled to an evidentiary hearing. Accordingly, Guest has

failed to argue any facts to satisfy Section 2254(e)(2)'s strict standards. Guest's request for an evidentiary hearing is therefore denied.

VI. CONCLUSION

For the reasons stated above, the court denies Guest's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This case is terminated and any pending motions are denied as moot.

Date: 3/22/04

WILLIAM J. HIBBLER

United States District Court Judge

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the petitioner's petition for writ of habeas corpus pursuant to 28 USC 2254 is denied.

Date: 3/22/2004